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Supreme Court, U.S.
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No. 99-2036

IN THE

Supreme Court of the United States

THE GOOD NEWS CLUB, ANDREA FOURNIER and DARLENE FOURNIER,

Petitioners,

v.

MILFORD CENTRAL SCHOOL,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

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STATEMENT OF THE CASE

The Good News Club ("Good News") is a religious organization, sponsored by the Children Evangelism Fellowship Inc., a worldwide Christian ministry, which is committed to the spreading of the gospel of the New Testament. In the fall of 1996, a local chapter of the Good News Club, which was sponsored by Rev. Stephen Fournier, a minister, and his wife Darlene, requested to use the Milford Central School District building for weekly meetings of Good News. The activities of Good News consisted of religious instruction and religious indoctrination and the Milford Central School District rejected the application. This lawsuit resulted.

Milford Central School District ("Milford") is a public school district and municipal corporation located in Otsego County, New York. Milford consists of a single school building that houses all grades of the district, K-12. Milford educates approximately 530 students of ages 5 through 18. As a public school district in New York, its facilities are open for use by the public in accordance with New York Education Law § 414. Milford had a Community Use of School Facilities policy which was in effect at the time that the Petitioners applied for permission to utilize Milford's facilities. Petition for Writ of Certiorari at D1-D3.

Milford denied the Petitioners' application for use of the building following a thorough review of the program, upon the ground that the program was the "equivalent of religious worship" which was prohibited under the Respondent's policy. Joint Appendix ("J.A.") at H1-H2. Upon the completion of pre-trial discovery, both parties moved for summary judgment upon facts which were largely stipulated. The District Court found, as a matter of fact, that Good News was in a different genre than Boy Scouts, Girl Scouts, and 4-H Clubs in that Good News dealt specifically with religious subject matter, not as Petitioners contend, a religious perspective on a secular subject matter. *See* Petition for Writ of Certiorari at C30-C31. The Circuit Court made the same factual findings and affirmed

the District Court's findings of fact that Good News was involved in religious instruction and worship, not a secular subject from a Christian perspective. *See* Petition for Writ of Certiorari at A16. We also note that the Petitioners did not challenge these factual findings upon appeal to this Court. There was no evidence and no argument that these factual findings by the District Court and the Court of Appeals were "clearly erroneous." *United States v. United States Gypsum Co.*, 333 U.S. 364, 394-395 (1948); *Bose Corp. v. Consumers Union of U.S.*, 466 U.S. 485, 497-501 (1984).

The Petitioners have presented a version of the "facts" which is at odds with the record evidence and the findings of the courts below. For this reason, Respondent recites the relevant facts, at some length.

Good News club meetings were open to children between the ages of 5 and 12. Petitioners initially described the activities of Good News as "a group of boys and girls meeting one hour a week for a fun time of singing songs, hearing a Bible lesson and memorizing scripture." Lodging at W1. Petitioners requested the use of a classroom or room in Milford on Tuesday afternoons beginning at 2:30 p.m. and ending at 4:30 p.m. Milford's class day ended at 2:56 p.m. each school day. The Good News meeting occurred between 3:00 p.m. and 4:00 p.m. Lodging at W1. The additional time, i.e. 2:30 p.m. to 3:00 p.m., was for "set up." The time from 4:00 p.m. to 4:30 p.m. was for "clean up."

The meetings of Good News were conducted by Rev. Stephen Fournier who is and was the pastor of the Milford Center Community Bible Church. J.A. at P4. Rev. Fournier described himself as a village missionary who provided full time pastoral leadership to small churches in the rural area. J.A. at P4.

Prior to the Petitioners requested the use of Milford for Good News meetings, the club met at the Milford Center Community Center Bible Church (J.A. at P10) and had approximately 8 to 10 students in regular attendance at its

meetings (J.A. at P12). The meetings held at the Milford Center Community Bible Church began at approximately 3:30 p.m. each Tuesday. J.A. at P92-P93. At that time, the children were transported from Milford to the church, via school buses. As a matter of courtesy, Milford had permitted its children to travel to the Milford Center Community Bible Church as passengers on a school bus, as long as there was extra room and the school buses traveled in that direction.

In September of 1996, the Fourniers were informed that the children would no longer be bused from the school to the church because additional buses were not available to transport the students. J.A. at P94. When Milford discontinued busing the students to the Good News meetings, the Petitioners requested use of the school.

Rev. Fournier testified that the phrase "Good News" has significance in scripture. J.A. at P17. The significance of the phrase "good news" in the title of the club is that "the good news is that Christ, according to the scriptures, died for our sins, was buried and on the third day rose again." J.A. at P18. Rev. Fournier testified that the phrase "good news" in the title of the club was derived from this scriptural reference. J.A. at P18.

Good News is affiliated with a larger parent organization known as Child Evangelism Fellowship Inc. Child Evangelism Fellowship Inc. is a corporation existing under the laws of the State of Michigan. Lodging at DD1. Child Evangelism Fellowship Inc. is an active Christian ministry operating in 142 countries worldwide including the United States. Lodging at DD1. One of the primary ministries worldwide of Good News is the enrollment of children. It boasts more that 100,000 children participate in Good News Clubs worldwide. Lodging at DD1.

Child Evangelism Fellowship Inc. provides teaching materials and training for Good News instructors. J.A. at P13. Child Evangelism Fellowship Inc. is a Christian organization.

J.A. at P17. In addition to providing teaching material and training for the instructors, Child Evangelism Fellowship Inc. also provides religious song sheets and music and copies of the *Daily Bread* booklet (daily Bible readings), for distribution. J.A. at P15. In addition, Child Evangelism Fellowship Inc. provides prayer support and some financial support such as insurance coverage for the local Good News activities. J.A. at P15.

The Petitioners have testified that the true name of the organization with which they have established is the "Evangelism Good News Club."[1] The club has typically been described in that manner by the Petitioners. J.A. at P36. The Petitioners have acknowledged that evangelism means introducing children to Jesus Christ. J.A. at P35.

The Petitioners have admitted that Good News was a religious organization whose activities were religious in nature. J.A. at P50. In this appeal, however, Petitioners attempt to contradict that admission.

Child Evangelism Fellowship Inc. distributes through Good News copies of the *Daily Bread*. Contrary to the assertion at page 8, footnote 1 of the Petitioners' Brief on the Merits, the *Daily Bread* is a devotional booklet containing passages from the Bible, specifically, the New Testament, according to Rev. Fournier. J.A. at P80. Although not used in classes, *per se*, the booklets were distributed to students in the Good News meetings held on school grounds. They were distributed to encourage the students to develop a daily habit of reading the Bible. J.A. at P83. The *Daily Bread* materials supplied were based on the King James version of the Bible. J.A. at P77. The Petitioners have acknowledged that the phrase "daily bread" appears in the Lord's Prayer and has a religious significance. J.A. at P81.

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1. Evangelism is defined as "the preaching or promulgation of the Christian Gospel; the work of an Evangelist." Webster College Dictionary, Random House, Copyright 1991, at 462.

Although the Petitioners allege that Good News was not an exclusive organization, the evidence in this case establishes otherwise. The Petitioners concede in their Brief that Good News' perspective was, in their words, "decidedly Christian." Petitioners' Brief at 9. Petitioners claim, however, that Good News was non-exclusive and open to all children between the ages of 6 and 12. Lodging at AA2. However, contrary to Petitioners' assertion that it was not an exclusive organization, the actual testimony offered by Affidavits from the Petitioners established that the group's meetings were limited, in fact, to only children of the Christian persuasion. Paragraph 11 of the Affidavit of Darlene Fournier in opposition to the motion for summary judgment states as follows:

> GNC does not teach or promote any particular Christian sect's doctrine or theology; there is no instruction concerning the differences of theology among the Catholic sects, among the Protestant sects, or between Catholic and Protestant sect.

Lodging at AA2.

Rev. Stephen Fournier also testified in his Affidavit as follows:

> 38. GNC neither teaches nor promotes any particular Christian sect's doctrine or theology.
>
> 39. There is no instruction covering the differences of theology among the Catholic sects, among the Protestant sects, or between Protestant and Catholic sects.

Petition for Writ of Certiorari at H5.

The above statements establish that the instruction was Christian, although the instruction does not allegedly highlight the differences between Christian religious groups. The Petitioners also acknowledged that children of faiths, other than Christian, did not attend the meetings of Good News. J.A. at P19-P20. Rev. Fournier conceded in his testimony that, for example, no child of Jewish or Moslem faith attended

meetings. J.A. at P20. Good News' obvious and predominant Christian orientation most likely had the effect of discouraging persons of other religious faiths from attending.

In the fall of 1996, Petitioners requested the use of Milford's building for purposes of conducting their meetings. They requested the use of a room in the school on Tuesdays "during the school year." Lodging at W1. Noticeably absent from the request for use was a request for use during the summer, vacation periods or evenings. Lodging at W1. Good News also requested the use of chairs, tables, a television and a VCR. The Petitioners requested these items be provided to them "free of charge." Good News actually met, pursuant to a preliminary order of the District Court, in a school classroom, namely Room 119. J.A. at P30. Room 119 was a special education resource room utilized by Milford. Significantly, Rev. Fournier testified that when he arrived at the room for the meeting, he waited for the students and staff to vacate the room before he began meetings of Good News. Rev. Fournier testified thusly:

> We begin approximately at 3:00, and that depends on when the people are out of the room. We don't get started until the room is clear and we strive to end at 4:00.

J.A. at P29. The evidence established that Good News met at the same time as other official after-school programs occurred. Milford's regular after-school "extra help" sessions, school detention and other official school events occurred at this time, namely 3:00 p.m. It is important to note that district-sponsored extra-curricular and athletic activities also took place during this "after-school" time. Each of these activities were conducted by Milford with paid staff and volunteers

The students who elected to participate in meetings of Good News did so pursuant to a written parental permission slip. Lodging at X2. The written permission slip referred to meetings in Room 119 of Milford on "Tuesdays, 3:00 to 4:00, September through June." Parental permission slips were generally required

to allow students to remain after school to participate in other school-sponsored activities. The announcements about Good News meetings made it clear that Good News promoted itself by advertising that its meetings were in the Milford schoolhouse. Lodging at X2. Thus, Good News was placed on a par with other officially sponsored after-school activities.

The Petitioners contended that their meetings provided the teaching of moral values from a Christian perspective. However, it should be noted that the reference to teaching morals from a Christian perspective *did not* appear in the original building use request form. Lodging at W1. Further, the reference to teaching morals did not first appear until Petitioners raised it in correspondence to Milford following the denial of their application. Lodging at W1.

Rev. Fournier testified as to how the meetings were conducted. His testimony established the overriding religious nature of the instruction he provided. The Good News meetings opened with the Reverend leading the children in prayer of thanksgiving in which they thanked God for allowing them to assemble and asked God to bless the meeting. J.A. at P22. The opening prayer contained references to the Lord Jesus Christ. J.A. at P22. Following the opening prayer, the Good News meeting progressed with a story, usually based upon a Bible verse or Bible story used for the purpose of illustrating the day's lesson. J.A. at P23-P24. The Bible stories were from the Old Testament as well as the New Testament. J.A. at P24. The Bible story was taught from a Christian perspective. For example, the children were taught that morals or values were senseless without Jesus Christ and that for the children who knew Jesus Christ as their Savior, they cannot be jealous because they have the strength of God to assist them in avoiding jealousy. J.A. at P25. Rev. Fournier described the core of the meeting as follows:

> Well, because we are teaching morals from a Christian perspective, we would present that perspective, which is that these morals or these

> values are senseless without Christ, that is to the children who know Christ as Savior, we would say, you know you cannot be jealous because you know you have the strength of God. To the children who do not know Christ, we would say, you need Christ as your Lord and Savior so that you might overcome these, you know, feelings of jealousy or overcome the desire to do bad things to those who somehow hurt you.

J.A. at P25.

In addition to the above, songs of a religious nature were sung (J.A. at P25), such as "You & Me, Jesus died on the Cross for You & Me" (Lodging at BB11), "I Have a Friend and Jesus is his Name" (Lodging at BB47). The songs contained references to the Lord and Savior Jesus Christ as well as references to God.

Verses from the scriptures, particularly the New Testament, were also the focus of Good News meetings. J.A. at P26. Games were also played during the Good News meetings. Those games were related to the particular Bible verse which was taught that day. J.A. at P26. The meetings also consisted of a story concerning missionaries in various foreign countries and spreading the gospel of the Lord Jesus Christ. J.A. at P28. Prizes were awarded to the children who showed knowledge of the day's lesson or the particular Bible verse. The prizes awarded were objects of a religious nature. J.A. at P29.

Rev. Fournier also acknowledged that the meetings of Good News contained occasions when various movies with a religious theme were shown. One movie shown was entitled "Where is God When I'm Scared?." J.A. at P90. The school's equipment was used to present those movies.

Rev. Fournier testified that the meetings of Good News were of a religious nature. J.A. at P51. The Petitioner acknowledged that there was a portion of each meeting of

Good News in which there was a "challenge" and "invitation." Rev. Fournier described this process thusly:

> We would challenge the children. We would basically say, if you know Jesus as your Savior, you need to place God first in your life. And if you don't know Jesus as Savior and if you would like to, then we will — we will pray with you separately, individually.

J.A. at P64-P65. Rev. Fournier testified that the challenge and invitation was presented "at the conclusion of the lesson, at the end of the story." J.A. at P65, P72- P73, and P75-P76.

The Petitioners alleged that their organization was comparable to the Boy Scouts, Girl Scouts, 4-H Club and Little League. The evidence established, however, that Good News meetings were qualitatively different from other clubs. The District Court and the Court of Appeals each found a specific religious content to the meetings of Good News, unlike the other groups. Petition for Writ of Certiorari at A16, C23-C31.

Again, contrary to assertions by the Petitioners, the Boy Scouts did not regularly use Milford for weekly or monthly meetings. The Boy Scouts used a part of the school facility for an organizational meeting with leaders workshop which occurred in November of 1996 and January of 1997. J.A. at D2. The Cub Scouts were permitted to use the Milford facilities. J.A. at D2. Unlike Good News, the Boy Scouts and Cub Scouts met in the evenings, usually at 6:00 p.m. or later.[2] Unlike Good News, the compulsory attendance laws did not provide a ready source of students for the Cub Scouts for their meetings. The Cub Scouts relied upon parents to drive those

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2. Although the record does not reflect the precise times for the start and finish of the Boy Scout organizational meeting or Cub Scout regular meetings, the evidence reveals that in the 1996-97 school year those meetings were all held in the evening beginning at 6:00 p.m. or after. Additionally, as Superintendent Peter Livshin advises, beginning in the 1999-2000 school year and thereafter, the Boy Scouts have withdrawn from Milford entirely and no longer use the school buildings.

children back to the schoolhouse to attend the meetings. In the case of Good News, those meetings began at a time when the students were already assembled in the schoolhouse and available to attend those Good News meetings. Good News sought to conduct its meetings as an indistinguishable extension of the school instruction day. Unlike Good News, the Cub Scouts have met throughout the school year, including the summers.

Rev. Fournier and the Petitioners acknowledged that they provided no specific evidence as to any religious or moral instruction provided by the Cub Scouts or Boy Scouts to its members. J.A. at P85. The Petitioners acknowledged, in their testimony, that they had no information as to how the merit badge entitled "God and Country" was earned. J.A. at P86. There was no evidence in the record to establish that any instruction in morals, religion, or Christianity or any other religious practice occurred on the premises of Milford. J.A. at P85-P86.

Rev. Fournier also admitted that he had no information or knowledge as to what specific religious instruction or moral instruction the Girl Scouts provided to their members at Milford. J.A. at P86-P87.

Rev. Fournier also compared his organization to the Little League. He acknowledged that he had no information which indicated that there was any specific instruction in morals or moral values provided by the Little League to its members. J.A. at P87-P88. Further, the record contains no specific evidence as to any instruction in morals or values presented by the Little League. J.A. at P87-P88.

The Petitioners also compared themselves to the 4-H Clubs. The record contains no specific evidence as to any religious or moral instruction given by the 4-H Clubs. J.A. at P88-P89.

The record also contains materials from the teaching manual for the sessions of Good News. In particular, in the Joint Appendix beginning at BB1 is contained a segment entitled "Six flannelgraph lessons from the early life of David for

children ages 5-12." That document entitled "*David, A Man After God's Heart*" was called a biblegram. Page BB5 of the teaching manual described "biblegram basics." This manual provided to the instructor, namely Rev. Fournier, information on teaching the bible lesson.

The manual contained several paragraphs entitled "Presenting the Gospel." This passage was designed to present the gospel for unsaved as well as saved children. The phrase "unsaved child" referred to one who had not yet accepted Jesus Christ as his or her personal Savior. See, "How to Lead a Child to Christ"; Lodging at BB4. Respondents contended that a review of this material beginning at Lodging BB1 through BB70 established that Good News was not instructing children in morality as much as it was providing instruction in the Christian religion emphasizing accepting Christ as a child's personal Savior and directing them along the path of a particular religious and spiritual life.

The meetings of Good News involved religious indoctrination and worship. The club relied upon the presence of students in the school for their increased enrollment at Good News meetings. The meetings were conducted in a regular school district classroom. The meetings were held so closely in time to the end of the school day that the Reverend had to wait until the students and teachers vacated the room before he began his teaching. Rev. Fournier acknowledged that attendance at Good News meetings had more than tripled since the meetings were held inside the school building at the end of the school day pursuant to the preliminary court order of the District Court. J.A. at P12. When the District Court issued the preliminary injunction allowing the Petitioners to use the school building for meetings, the enrollment in Good News rose from 8 (J.A. at P12) children to 28 (Lodging at AA2), an increase of 250%.

It was upon these facts that the lower courts affirmed Milford's action in excluding the Petitioners' activity from the school.

SUMMARY OF ARGUMENT

Milford presents two principle arguments in opposition to the Petitioners' appeal. First, Respondent contends that the Establishment Clause of the First Amendment was violated by the proposed use and the actual use pursuant to the preliminary order of the District Court. The evidence in this case established that the Petitioners engaged in religious worship and instruction when they conducted meetings of Good News. The evidence also established that the Petitioners sought the use of the Milford school building only at times and on occasions when the students were actually assembled. Petitioners sought the use of the school building at 3:00 p.m. on Tuesday afternoons, during the school year. Petitioners limited their request for use of the building to times when the students were already assembled and readily accessible for purposes of solicitation and proselytizing. Respondent submits that it conducted a good faith, thorough investigation of the details of the program offered by Good News and correctly concluded that to permit this club involved Milford in impermissibly endorsing, promoting and aiding a specific religion. *People of the State of Illinois, ex rel. McCollum v. Board of Educ.*, 333 U.S. 203 (1948).

The second argument advanced by Milford is that in denying access to Good News, it had not engaged in impermissible viewpoint discrimination. The evidence established that there was no group that had been permitted to use Milford's limited open forum for purposes similar to those of Good News. The evidence established that meetings of Good News were qualitatively different from the meetings of other groups permitted to use the school facilities. The meetings of Good News were decidedly religious and specifically Christian in their orientation. No other group, club or activity engaged in any similar conduct. The Respondent contends that it properly and lawfully excluded Good News from the limited open forum in order to ensure that minor children of tender ages between 5 years and 12 years were protected from impermissible adult-led, adult-sponsored religious proselytizing in Milford.

Milford contends it rejected the use of the facility by Good News upon the ground that to permit such use on its premises under these circumstances, would create an unconstitutional establishment of religion. *Everson v. Board of Educ.*, 330 U.S. 1 (1947); *People of the State of Illinois, ex rel. McCollum v. Board of Educ.*, 333 U.S. 203 (1948).

The Respondent urges this Court to affirm the judgment of the court below.

ARGUMENT

I. PETITIONERS' PROPOSED USE OF THE SCHOOL FACILITY, UNDER THE FACTS OF THIS CASE, VIOLATED THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT.

A. The Purpose of Petitioners' Proposed Use of the Building Was to Advance Religion.

In *Everson v. Board of Educ.*, 330 U.S. 1 (1947), this Court stated:

> Neither a state nor the federal government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over the other. Neither can force or influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs for church attendance or non-attendance . . . Neither the state nor the federal government can openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and state."

Everson, 330 U.S. at 15-16.

We respectfully submit that the Petitioners' use of the school facilities under the conditions described above, constituted a

clear and unmistakable breach of the wall of separation of church and state. Petitioners sought to have Good News, an organization which was unequivocally Christian in its orientation, which unabashedly taught a belief in Jesus Christ, and which taught acceptance of Christ as a personal Savior as the foundation of all morality, to use a school's classroom beginning at 3:00 p.m for such meetings while other District-sponsored after-school activities took place in the same building.

This case involved a circumstance where a "quintessentially religious" presentation occurred immediately upon the conclusion of the regular school day and while the children who had been compelled by law to be there, were still assembled and thus available for solicitation to attend these classes of religious instruction and indoctrination. The classes were run by adults and sponsored by adults. Good News sought to use the school facilities at 3:00 p.m. and only during the school year, because that was where the children were assembled. The Use of Facilities Request Form (Lodging at W1) revealed the true intent of the Petitioners in this matter. The Petitioners sought the use of the school building when school was in session and children were present. Joint Appendix W1 established that the building use request was from 2:30 p.m. to 4:30 p.m. each Tuesday afternoon. Regular classes ended at 2:56 p.m. The request for use was only during the school year. There was no request to use the school building during vacations or summertime. The time of day was selected to be in close proximity to the regular school day. This would allow the Petitioners to take advantage of the fact that the children were required by state law to be present and assembled in the school and thereby more readily available for solicitation and to attend the Good News program.

The evidence established that the Petitioners were taking advantage of the compulsory attendance laws. Membership in Good News consisted of 8 to 10 students while the meetings were held at the Milford Community Bible Church. When the meetings were held in the Milford Central School District

immediately after school, the Petitioners' membership increased to 28 students. This represented an increase of 250% in enrollment. In addition to utilizing a regular school classroom, Room 119, which served as a special education resource room by day, Good News also utilized Milford's television and VCR, chairs, tables, and desks.

As observed by this Court in *People of the State of Illinois, ex rel. McCollum v. Board of Educ.*, 333 U.S. 203 (1948):

> Here not only are the state's tax supported public school buildings used for the dissemination of religious doctrines. The state also affords sectarian groups an invaluable aid in that it helps to provide pupils for their religious classes through use of the state's compulsory public school machinery. This is not separation of church and state.

McCollum, 333 U.S. at 465-466.

Milford respectfully submits that there is essentially no qualitative difference between this case and *McCollum, supra*. When Good News was permitted under the District Court's preliminary injunction to use the school building at 3:00 p.m. each Tuesday, there was little question that the state's tax supported public school buildings and the State's compulsory attendance laws were viewed as assisting in the dissemination of religious doctrine. For this reason, the District Court vacated its preliminary injunction and dismissed Petitioners' action. Petition for Writ of Certiorari at C32. Milford respectfully submits that a public schoolhouse full of students attending through the compulsory attendance laws should not be made available to Petitioners for clearly sectarian purposes which are adult-led and adult-sponsored. The public school facilities were used by this sectarian group to promote, encourage and sustain religious teaching.

Milford contends that the true purpose of Good News was revealed in that it sought to use the school facilities only at the times when the children were present in the building at the behest of the state. Good News appeared to be uninterested in the school

building in the evenings, on weekends, during vacations and summers. Good News sought to go where the children were.

The record below established certain essential distinctions from facts which were pertinent to prior holdings of this Court. Good News did not seek the mere use of a public community building, such as the plaintiffs did in *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993). Unlike the plaintiff in *Widmar v. Vincent*, 454 U.S. 263 (1981), the Petitioners did not merely seek to hold a meeting on school premises. The fundamental distinction between the activities of Good News and plaintiff in *Lamb's Chapel, supra,* and *Widmar, supra* is that Good News sought to utilize the school building only at times when the children were already present and assembled there pursuant to the authority of the state under its compulsory attendance laws. Absent the above, the school building was of no value to the Petitioners. We respectfully submit that the prohibition articulated by this Court in *McCollum, supra,* and *Everson v. Board of Educ.*, 330 U.S. 1 (1947), compels the conclusion that such use would impermissibly involve this school district in approving and sanctioning the establishment of religion or the aid to a specific religion in violation of the Establishment Clause.

B. Good News' Actual Use of the Building Proves the Impermissible Entanglement with and Establishment of Religion.

Respondent had the rather unique circumstance, as presented by the record, of the Petitioners being permitted to use the school building under the District Court's preliminary order. This provided the Respondent with evidence of actual, not intended use. Thus, the court below ruled on a record comprised of evidence from the actual sessions held by Petitioners. The findings of the Circuit Court (Petition for Writ of Certiorari at A16-A17) and the District Court (Petition for Writ of Certiorari at C15-C25) plainly recognized the deeply Christian and religious nature of the presentation offered by the Petitioners in this case. Further, both the District Court and

Circuit Court made specific factual findings that these meetings were religious instruction and worship, not ones dealing with secular subjects such as morality or character education.

The District Court made findings and drew conclusions about the Petitioners' activities. The District Court concluded as follows:

> The Club's activities are characteristic of formal religious instruction, structured in a classroom setting. Each Club has a teacher, uniform lesson plans, and teaching materials . . . That the Club does not promote any one specific denomination or theology within the Christian faith does not make its activities any less religious in nature. Good News' teaching materials and lessons are oriented toward instilling Christian beliefs in the children. To this end, the children pray, read the Bible, memorize biblical verses, and sing songs that have religious references. These activities "clearly denote the organization as a religious club" designed to "instill Christian religion and values" in the children.

Petition for Writ of Certiorari at C23.

The Circuit Court also made similar findings. The Circuit Court concluded:

> We conclude, as did the District Court, that the Good News Club is doing something other than simply teaching moral values. As we stated in *Bronx Household of Faith*, it "is not difficult for school authorities to make" the distinction between the discussion of secular subjects from a religious viewpoint and the discussion of religious material through religious instruction and prayer. Although other cases may present difficult questions of line-drawing, we believe that the school authorities, after thorough inquiry and deliberation, correctly

> determined that the activities of the Club fall clearly on the side of religious instruction and prayer.

Petition for Writ of Certiorari at A16.

Respondent submits that Petitioners did not challenge these factual findings. Petitioners have brought forth no argument that these factual determinations were "clearly erroneous" or erroneous in any respect. It appears that Petitioners argue these activities should be permitted because they could be considered instruction in morality.

This was not a case of teaching morality from a Christian perspective. This assertion distorts the facts and misconstrues the evidence in this case. Petitioners attempt by way of a "definitional coup" to change this case from one where there is a clear and present Establishment Clause violation into a "free speech-viewpoint discrimination" case. The Respondent submits that this is not a free speech case. In this case, the Petitioners sought to have the most vulnerable of Milford's elementary age children in public schools attending these club meetings in a classroom only minutes after their regular classroom teacher finished lessons and instruction for the day. At a time when other students were still assembled in other classrooms in the building receiving additional instruction from regular staff members, while practices for school-sponsored athletic endeavors were occurring, and while school-sanctioned, after-school extracurricular activities were occurring, the youngest of the school's children were being indoctrinated into the Christian faith by a reverend of a local Protestant Church. The meetings of Good News were excluded from the forum because of the content of the meetings, not the viewpoint the meetings presented. J.A. at H1-H2. To allow this practice would be to establish a preference for this religion.

Respondent submits that an impressionable 5 or 6 year old student cannot be expected to make the subtle distinction between a reverend who conducts such a "club meeting" and the regular instructors hired by the school district to provide

instruction during the after-school programs or to supervise school-sponsored club meetings at 3:00 p.m. We respectfully submit that students age 5 through 12 cannot be expected to make the subtle distinctions that the Petitioners and the various amici in this case suggest they are able to make. Indeed, this Court observed that assumptions about the ability of students to make these subtle distinctions are less valid for elementary age children who tend to be less informed, more impressionable, and more subject to peer pressure than average adults. *See Board of Educ. of the Westside Community Schools v. Mergens*, 496 U.S. 226, 250-251 (1990); *see also Edwards v. Aguillard*, 482 U.S. 578, 584 (1987); *see also Brown v. Woodland Joint Unified School Dist.*, 27 F.3d 1373, 1378 (9th Cir. 1994).

The students who were not Good News members could observe Good News activities by passing in the hallways. The children who passed by and saw others praying or singing hymns could understandably conclude that Milford endorsed and promoted this religion. The record evidence established that the actual use of the building was religious worship and instruction and a violation of the Establishment Clause.

C. Establishment Clause Case Law Compelled the Respondent to Exclude Good News.

This Court has long viewed public schools as a special environment in need of certain protections, including the banning of government initiated prayer therein. In *Engel v. Vitale*, 370 U.S. 421 (1962), the respondent board of education directed the school district's principal to cause the following prayer to be said aloud each day in class: "Almighty God, we acknowledge our dependence upon Thee and we beg Thy blessings upon us, our parents, our teachers and our country." *Id.* at 422. This Court found that the school district violated the Establishment Clause of the First Amendment by requiring the preceding prayer to be recited at the beginning of each school day. *Id.* at 424.

In *Lee v. Weisman*, 505 U.S. 577 (1992), a middle school student objected when the school district invited a member of the clergy to give an invocation and benediction at her middle school graduation. *Id.* at 581. Recognizing, as it has consistently done in the past, that there are heightened concerns with protecting freedom of conscience from subtle, coercive pressure in the elementary and secondary schools and "that prayer exercises in public schools carry a particular risk of indirect coercion." *Id.* at 592. This Court found that the school district's actions violated the Establishment Clause of the First Amendment.

This Court has issued a similar holding, even where prayer at non-instructional events is student initiated, student led, non-sectarian and non-proselytizing. In *Sante Fe Independent School Dist. v. Doe, et al.*, 530 U.S. 290 (2000), this Court invalidated two of the school district's policies permitting students to vote to determine whether a student would deliver a prayer at varsity football games and to select which student deliver said prayer.

The courts have also ruled unconstitutional a school policy that permitted the distribution of Gideon Bibles to fifth grade public school students. *Berger v. Rensselaer Cent. School Corp.*, 982 F.2d 1160 (7th Cir. 1993). The court there found an Establishment Clause violation in the distribution of the Bibles to students assembled in the school.

We also note that by allowing these "club meetings" to occur on school grounds at the times and places requested by the Petitioners would amount to an "endorsement" of religion. In *County of Allegheny v. Greater Pittsburgh ACLU*, 492 U.S. 573 (1989), the court ruled that the term "endorsement" is used interchangeably with "favoritism and promotion." *Id.* at 593. If Milford were ordered to permit use of the school building by Good News, such action would create an "endorsement", "promotion" and favoritism of this religion.

In *School Dist. of Abington Township v. Schempp*, 374 U.S. 203 (1963), this Court found unconstitutional the practice sanctioned by Pennsylvania law of allowing at least 10 verses

of the Holy Bible to be read without comment at the opening of each school day in the public schools. A child could be excused from the Bible reading or attending such Bible reading upon the request of his parents or guardian. This Court found the practice unconstitutional and in violation of the First Amendment. This Court observed:

> When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect, coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.

School Dist. of Abington Township, 374 U.S. at 221 *quoting Engel v. Vitale*, 370 U.S. at 430-431.

This Court further observed:

> The place of religion in our society is an exalted one, achieved through a long tradition of reliance on the home, the church and the inviolable citadel of the individual heart and mind. We have come to recognize through bitter experience that it is not within the power of government to invade that citadel, whether its purpose or effect be to aid or oppose, to advance or retard. In the relationship between man and religion, the state is firmly committed to a position of neutrality. Though the application of that rule requires interpretation of a delicate sort, the rule itself is clearly and concisely stated in the words of the First Amendment.

School Dist. of Abington Township, 374 U.S. at 226.

The decision in *School Dist. of Abington Township* is of special interest because counsel for the school district there argued in support of the practice of daily Bible readings by asserting that the school district sought merely to teach morality from a non-religious, non-theological perspective. *See* Transcript of Oral Argument, *School Dist. of Abington Township v. Schempp*, Case No. 142, February 27, 1963, at 3.

The argument advanced by the school district in support of the practice of reading Bible verses to the students each morning was that the school was merely teaching morality from the common source of morality, namely the Bible. Counsel for the petitioner school district, Philip Ward of Philadelphia, Pennsylvania, argued to the Court thusly:

> Gentlemen, that is precisely what we are doing. We are teaching morality without religion, cut adrift from theology. And that is proper for the people of Pennsylvania. We can bring to our children lessons of morality in their school days, as long as we are not bringing religion, not bringing theology. The people of Pennsylvania have wanted to do this, they have since the beginning wanted to bring these lessons in morality to the children. So what do they do? They pick a common source of morality, the Bible.

Transcript of Oral Argument, *School Dist. of Abington Township v. Schempp*, Case No. 142, February 27, 1963, at 3.

In the face of this argument, this Court disagreed and found that the practice of reading Bible verses to children assembled in school to be an unconstitutional establishment of religion in violation of the First Amendment. The Respondent contends that there is no appreciable difference between reading Bible verses during the school day and meetings of Good News at 3:00 p.m., mere minutes after the conclusion of the school day. Respondent argues that constitutional principles regarding the Establishment Clause of the First Amendment, are not so easily and deftly dispensed with as to be determined by the stroke of the clock. Rather, when the totality of the circumstances are examined, as they have been in this case by the lower courts, it is clear that Good News asks the government to lend its tacit support to the propagation of a particular religion as taught by Rev. Fournier in the meetings of Good News.

As Judge Miner observed in the opinion of the United States Court of Appeals for the Second Circuit in this case, the activities

of the Good News Club were "quintessentially religious." Petition for Writ of Certiorari at A17. We respectfully submit that the fundamentally religious nature of this activity is not changed by suggesting that this is "free speech exercised in a limited public forum." Rather, this is instruction in the tenets of a particular religious faith at a time and place when children are still assembled pursuant to the power of the compulsory attendance laws of the state in a classroom owned, operated and supported by the state. This religious indoctrination and inculcation was occurring at a time and a place when the activities of Rev. Fournier were virtually indistinguishable from regular classroom teachers, coaches and other professionals employed by Milford in district-sponsored, after-school activities.

Respondent contends that its action in excluding Good News from the Milford facility was entirely consistent with this Court's various precedents as they relate to the public school environment. In *Edwards v. Aguillard*, 482 U.S. 578 (1987), this Court found unconstitutional a Louisiana creationism statute that forbade the teaching of the theory of evolution in public elementary and secondary schools unless similarly accompanied by instruction in the theory of "creation science." In that case, this Court observed as follows:

> This Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools. Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family. Students in such institutions are impressionable and their attendance is involuntary.

Edwards, 482 U.S. at 583-584.

Similarly, in *Stone v. Graham*, 449 U.S. 39 (1980), this Court invalidated a requirement for the posting of the Ten

Commandments on public classroom wall. The Court found a violation of the Establishment Clause. Similarly, in *Engel v. Vitale,* 370 U.S. 421 (1962), this Court held that the requirement for the recitation of a "denominationally neutral" prayer was unconstitutional.

The Circuit Courts have been similarly vigilant. For example, in *Berger v. Rensselaer Cent. School Corp.*, 982 F.2d 1160 (7th Cir. 1993), the court declared the practice of distributing Gideon Bibles during the regular school day with the permission and consent of the school officials, to be a violation of the Establishment Clause.

In *County of Allegheny v. Greater Pittsburgh ACLU*, 492 U.S. 573 (1989), this Court concluded that a nativity scene was impermissible under the Establishment Clause when placed in a public park. In *County of Allegheny, supra,* this Court observed that the Establishment Clause must be applied with special sensitivity in a public school:

> This is not to say that the combined display of a Christmas tree and a Menorah is constitutional wherever it may be located on government property. For example, when located in a public school, such a display might raise additional constitutional considerations. *Cf., Edwards v. Aguillard*, 482 U.S., at 583-584 (Establishment Clause must be applied with special sensitivity in the public school context).

County of Allegheny, 492 U.S. at 620 n.69.

Respondent notes the argument advanced by Petitioners that the children were not required to attend Good News meetings. Petitioners' Brief at 9. Further, Milford's compulsory school day ended at 2:56 p.m. However, the children involved in this program were between the ages of 5 and 12 years. The parents of these children had signed permission slips for them to attend. The children could not leave the building until retrieved by their parents. Thus, as a practical matter, for these young children, their attendance was "compulsory."

Respondent submits that its action in excluding the Petitioners from the utilization of the schoolhouse for the religious instruction and religious indoctrination purposes described above was entirely consistent with and even compelled by this Court's precedents under the Establishment Clause of the First Amendment. Respondent contends that it would be incongruous to prohibit the reading of the Ten Commandments over the loudspeaker, in the morning, while students are assembled but permit the reading of the Ten Commandments to students only minutes after the end of the school day while students are still assembled. Respondent argues that it would be incongruous to prohibit students from receiving religious instruction during the school day but permit the same religious instruction only minutes after the bell rings at the end of the school day while official school-sponsored, after-school activities are occurring. We respectfully submit that the hours of 3:00 p.m. to 4:00 p.m. were a natural extension of the school day which warranted the same protection as the regular school day. Milford perceived that there was no material difference between the circumstances of Rev. Fournier presenting religious lessons and instruction to students duly assembled at 3:00 in the afternoon and those who were sitting in a regular class at 2:30 p.m. If the Ten Commandments cannot be posted in a public school and a crèche cannot be placed on the front lawn of Milford, we contend that religious instruction and religious worship along with religious indoctrination (from whatever perspective) cannot also be permitted in the schoolhouse during the extended school day.

Petitioners have arranged to conduct these religious instruction classes at a time when the Good News program became virtually indistinguishable from other after-school programs sponsored by Milford. We contend that the intersection of religious exercise, religious instruction, and a program that immediately followed the conclusion of the regular school day, while students were still assembled pursuant to the state's authority and its compulsory attendance laws, created a

circumstance which was clearly and unequivocally a violation of the Establishment Clause of the First Amendment. We urge this Court to affirm the Judgment of the court below.

II. RESPONDENT HAS NOT ABRIDGED THE PETITIONERS' RIGHTS UNDER THE FIRST AMENDMENT "FREE SPEECH" CLAUSE.

A. The Respondent Was Entitled to Impose Reasonable Restrictions on the Use of its Limited Public Forum.

In *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37 (1983), this Court recognized that the First Amendment does not guarantee access to property "simply because it is owned or controlled by the government." *Perry*, 460 U.S. at 46. We submit that Milford operated a limited public forum. We contend that Milford had the right, and indeed the obligation, to maintain the integrity of its facilities. As this Court aptly observed in *Perry Education Assn. v. Perry Local Educators' Assn.*:

> Implicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identity. These distinctions may be impermissible in a public forum but are inherent and inescapable in the process of limiting a nonpublic forum to activities compatible with the intended purpose of the property. The touchstone for evaluating these distinctions is whether they are reasonable in light of the purpose which the forum at issue serves.

Perry Education Assn., 460 U.S. at 49. The forum of Milford exists for purposes of educating the students in the public school district. A public school district must take special care to ensure that its facilities are not used for improper or inappropriate purposes. Milford was obligated to follow New York Education Law § 414. Education Law § 414 only permits certain activities in the schools and if not specifically authorized, the statute

excludes various other activities from the public school. The statute prohibits the public schools from opening its forum to "commercial speech." New York Education Law § 414. The school may not open its forum under state law for purposes of allowing local entrepreneurs to advertise or promote the selling of their wares in the public school setting.

The school is closed to groups which routinely practice exclusion, such as certain exclusive groups and organizations, other than veterans' organizations. New York Education Law §§ 414(c) and (d). In addition, Milford has prohibited political activity from occurring on school premises in accordance with state law. New York Education Law § 414(e). The meeting of a local political party or political caucus would be impermissible in a New York public school district, without voter approval.

Furthermore, the school closed its facilities to impermissible types of expression and behavior such as sexually explicit or morally offensive behavior. J.A. at N19. Milford reserved for itself, the right to close the forum to other activities which would be dangerous or disruptive to the school operation or inconsistent with the school's purpose. J.A. at N19.

The School District had also, in accordance with state law, closed this limited open forum to purely religious instruction and services. New York Education Law § 414. New York State also has a long tradition mandating separation of church and state especially in regard to the operation of its public schools. *See McCollum v. Board of Educ.*, 333 U.S. 203 (1948), concurring opinion Justice Frankfurter, p. 214-215.

This Court has recognized the sensitivity of the environment for elementary age children and the heightened concerns a school district must have for its students. In *Edwards v. Aguillard*, 482 U.S. 578, 583-584 (1987), this Court recognized that elementary age children are entitled to special protection and concern in regard to what is permitted to take place in the school forum. *County of Allegheny v. Greater Pittsburgh ACLU*, 492 U.S. 573, 620 n.69 (1989); *see also Widmar v. Vincent*, 454 U.S. 263, 274 n.14 (1981); *Brown v. Woodland Joint*

Unified School Dist., 27 F.3d 1373 (9th Cir. 1994); *Berger v. Rensselaer Cent. School Corp.*, 982 F.2d 1160 (7th Cir. 1993). Further, Congress has established special rules in the "Equal Access Act" to limit religious activities in the public secondary schools to those which are student-led, student initiated and not "directed, controlled, conducted, or regularly attended by non-school persons." This Court has found the Equal Access Act constitutional in *Board of Educ. of the Westside Community Schools v. Mergens*, 496 U.S. 226, 236 (1990). The Equal Access Act excluded similar religious expression in the elementary schools. We contend that Congress recognized that very young children cannot discern the differences between state sponsorship and private acts in this context.

The limited open forum must be closely regulated because the forum was designed for the education of our youngest children. The age and relative inability of the elementary school age children to make the subtle distinctions necessary to discern who is or is not an official of the school district for purposes of religious instruction, creates a very rational and, indeed, compelling basis upon which the school district may permissibly act to exclude various expressions.[3] In this case we have adult-led, adult-sponsored religious worship and prayer with the purpose of indoctrination of children into a religious faith. Respondent was entitled to close its forum to this activity.

Milford, like many other school districts in Central New York, had created a limited open forum. As such, it had the right and indeed the obligation to regulate and limit certain expressions of speech in that limited open forum. This Court has recognized that public school boards and administrators must be afforded considerable discretion in operating the

3. We do not concede that Respondent must show a compelling interest in order to exclude religious instruction and religious worship. We note that this Court has not resolved this issue. *See Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 391-392 (1993). We contend that whichever standard is applicable, Milford has met the standard.

school. *Edwards v. Aguillard*, 482 U.S. 578, 583 (1987). The Respondent's actions were permissible. The limited open forum was properly closed to this religious institution. The Court should affirm.

B. The Limited Open Forum Was Appropriately Closed by Milford.

The parties to this proceeding have stipulated and the Second Circuit has affirmed, that Respondent created a limited public forum, pursuant to New York Education Law § 414. It permitted youth groups such as the Boy Scouts (to a limited extent), the Girl Scouts, the local Little League and 4-H Clubs to use the facilities.

"Limited public forums" are those which have been designated by the government as a "place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects." *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 802 (1985). *See also Bronx Household of Faith v. Community School Dist. No. 10*, 127 F.3d 207 (2d Cir. 1997).

This Court has recognized that in the context of a limited open forum a school district or the state may exclude certain subjects. In *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995), this Court observed: "The necessities of confining a forum to the limited and legitimate purposes for which it was created may justify the state in reserving it for certain groups or for the discussion of certain topics." *Rosenberger*, 515 U.S. at 829. This Court has also observed that the state or a school district may exclude speech where the content of that speech exceeds the lawful boundaries which the state or the school district has set for itself. *See Rosenberger*, 515 U.S. at 829. In this case, we contend that the forum created by Milford was not and had never been open to purely religious instruction, indoctrination and worship. The Petitioners seek to promote the use of adult-led, adult-initiated prayer and worship of a particular religious faith in a

public elementary school. Those who did not accept this religious doctrine were essentially compelled to avoid this program.

The record in this case reflects that Milford consistently excluded certain types of speech, including purely religious worship and proselytizing speech. Rev. Fournier testified that the former superintendent advised him that he had denied previous requests for purely religious uses and, therefore, could not allow Good News its intended use. J.A. at P44. The policy enacted by Milford was consistent with New York Education Law § 414.

The evidence in the record did not establish a single incident or instance at Milford of comparable instruction by any of the groups to which the Petitioners have compared themselves. We note, in particular, that there was no evidence in the record that explains what character education was actually provided by the Boy Scouts or Cub Scouts at Milford. We also note that the record contains references to the fact that the meetings of the Boy Scouts held at the school district were for a limited purpose and on limited occasions. Specifically, the record reflects that only leadership meetings and organizational meetings were held at Milford. Thus, there was no direct evidence that any instruction in "moral education" or in "spiritual development" ever took place on the Milford premises. Further, such instruction, if it even took place on an incidental basis, was vastly different from the religious worship and instruction involved here.

Furthermore, there was no development in the record of precisely what it was that the Cub Scouts did by way of providing "moral education." The only reference to the Cub Scouts having provided any "moral education" was found in the Joint Appendix at Y3 which states that one of the purposes of the Cub Scouts was to "influence a boy's character, development and spiritual growth; develop habits and attitudes of good citizenship, etc." Absent from the record was any specific evidence to demonstrate that the Cub Scouts or the

Boy Scouts engaged in any form of similar religious instruction or worship. The record evidence in this case failed to demonstrate how the Cub Scouts or Boy Scouts conducted their meetings. There was no evidence of what was done at the meetings, and whether any instruction or education in regard to moral, spiritual or similar issues was ever actually presented by such organizations in Milford. On this record, we respectfully submit that there was no instance of any group or club which conducted an activity similar to Petitioners.

We respectfully submit that the Petitioners' "Free Speech - Viewpoint Discrimination" argument must yield to the overriding Establishment Clause concerns presented here and the lack of evidence of discrimination by Respondent. *Lee v. Weisman*, 505 U.S. 577, 587 (1992); *Berger v. Rensselaer Cent. School Corp.*, 982 F.2d 1160, 1168 (7th Cir. 1993). The Court in *Berger* observed:

> Defendant is also wrong as a matter of law that the First Amendment interest in free expression automatically trumps the First Amendment prohibition on state sponsored religious activity. The reverse is true in the coercive context of public schools.

Berger, 982 F.2d at 1168. We categorically deny the claim that the Respondent had engaged in "prohibited viewpoint discrimination." Milford had not discriminated against the Petitioners on the basis of Petitioners' viewpoint. Milford had rejected the Petitioners' use of the school building for the simple reason that the Petitioners sought to engage in religious instruction and religious indoctrination on school premises immediately at the end of the school day. We contend that this result was not only permissible, it was required.

> The principle that government may accommodate the free exercise of religion does not supercede the fundamental limitations imposed by the Establishment Clause. It is beyond dispute that, at a minimum, the Constitution guarantees that

> government may not coerce anyone to support or participate in religion or its exercise or otherwise act in a way which "establishes a [state] religion or religious faith, or tends to do so."

Lee v. Weisman, 505 U.S. 577, 587 (1992).

We also note and strenuously oppose the argument advanced by the Petitioners that Milford would exclude all activity by Good News. See, Petitioners' Brief at 13. Such a suggestion is contrary to the record evidence. In the Joint Appendix at H1-H2, the Superintendent of Schools acknowledged this Court's decision in *Lamb's Chapel* and stated uses consistent with that decision would be permitted. However, the Superintendent, after a detailed review of Petitioners' program concluded that its program was the equivalent of religious worship (J.A. at H1-H2) and denied the request.

The decision to deny access to Good News was based upon a well-founded belief that Good News was engaging in the practice of religion and religious indoctrination in the school through an adult-led and adult-initiated program. The basis for this exclusion was approved by the lowers courts in this case.

Milford maintains that its decision to exclude was based solely upon its investigation of the activities of Good News and its determination that Good News was engaged in religious instruction and religious indoctrination in the school. The record established that the decision of Milford was based entirely upon consideration of the content of the speech, not its viewpoint. The limited open forum was properly closed to this program of adult-led, adult-initiated proselytizing of Milford's most vulnerable students.

C. Milford Did Not Become Excessively Entangled with Religion When it Inquired into Good News' Intended Use.

We note that the Petitioners and several of the amici make the argument that the Respondent cannot separate religious instruction and religious services from a secular activity carried

out from a religious viewpoint. Petitioners' Brief at 22-26. We disagree and respectfully submit that if this argument were accepted then all religious activity must be permitted at any time in the schoolhouse. As discussed in Point I above dealing with the Establishment Clause, the issue of presenting religious material from a non-sectarian point of view or a non-theological point of view was rejected in *School Dist. of Abington Township v. Schempp, supra*. We respectfully submit that the argument that offering up this religious instruction and indoctrination as nothing more than "teaching morals from a Christian perspective" is to ignore the stark reality of the facts of this case. The Petitioners have engaged in, and have actively pursued, an agenda of religious instruction and religious indoctrination. This was not changed by the Petitioners' facile characterization of its intent. An investigation of the purpose of Good News' intended use of the school revealed the plainly religious purpose of the Petitioners' request.

This Court has often recognized that drawing the lines of distinction in Establishment Clause cases is not a precise science. In *Lynch v. Donnelly*, 465 U.S. 668 (1984), this Court stated:

> In each case, the inquiry calls for line drawing; no fixed, *per se* rule can be framed. The Establishment Clause like the Due Process Clause is not a precise, detailed provision in a legal code capable of ready application. The purpose of the Establishment Clause "was to state an objective, not to write a statute." *Walz, supra*, at 668. The line between permissible relationships and those barred by the clause can no more be straight and unwavering than due process can be defined in a single stroke or phrase or test. The clause erects a "blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship."

Lynch, 465 U.S. at 678-679.

We contend that it is not a difficult task for school districts to determine whether a certain activity is "quintessentially religious." Nor does such an inquiry "entangle" the Respondent with the religion of the Petitioners. Such line drawing does not involve the school district or the courts in impermissible intrusion into religious activity nor does it entangle the school district with religion to make such determinations. The school district is responsible to examine and oversee what takes place in its school buildings, both before, during and after the school day. For example, this Court has held that school officials must make "certain that . . . subsidized teachers do not inculcate religion." *Lemon v. Kurtzman*, 403 U.S. 602, 619 (1971). Schools are required to make these determinations and have done so often. *Marchi v. Board of Co-op. Educational Services*, 173 F.3d 469, 475 (2d Cir. 1999) where the Court prohibited a teacher from instructing in religious matters. *Peloza v. Capistrano Unified School Dist.*, 37 F.3d 517 (9th Cir. 1994) where a school district properly prohibited a teacher from discussing his religious believes with students during the school day on school grounds. *Helland v. South Bend Community School Corp.*, 93 F.3d 327 (7th Cir. 1996) where the Court ruled that a school district correctly removed a substitute teacher because of his efforts to teach religion in the school during the day. *See also Bishop v. Aronov*, 926 F.2d 1066 (11th Cir. 1991); *Roberts v. Madigan*, 921 F.2d 1047 (10th Cir. 1990); *Webster v. New Lenox School Dist.*, 917 F.2d 1004 (7th Cir. 1990).

Milford was obligated to proceed with "heightened concern" for protecting the freedom of conscience of the students in its district from subtle and coercive pressure. *See Lee v. Weisman*, 505 U.S. 577, 592 (1992). This Milford attempted to do by asking for information from Good News that was no different than what was requested from others who sought use of the building.

Contrary to assertions by Petitioners, there were no probing questions asked of any member of Petitioners' Club. Petitioners' Brief at 25. Those inquiries only occurred *after* the litigation

was commenced and during an Examination Before Trial. The process which Respondents followed consisted of an examination of the materials to be used in the program and an analysis of the Petitioners' own description of the event on a standard form. J.A. at W1. This inquiry represented a non-discriminatory examination of the purpose of the request for use of the building; similar to that of every other user.

The Respondent made a reasoned and careful judgment regarding the Petitioners' requested use of the building. Respondent followed the same procedure in regard to Petitioners' application as it did with all others. Respondent did not become unduly entangled with Petitioners' religious practices.

D. The Impressionability of the Young Students in this Case Has Been Recognized by the Court.

Respondent also rejects the argument that the impressionability of elementary age students, ages 5 to 12, is something which must be proven by evidence in the record. Amicus Brief of Laycock at 5. We respectfully submit that such an assertion is without foundation. This Court and numerous other courts have recognized and taken notice of the impressionability of young students in elementary and secondary public schools. *See Lee v. Weisman, supra*; *School Dist. of Abington Township v. Schempp*, 374 U.S. 203 (1963); *Edwards v. Aguillard*, 428 U.S. 578 (1987); *Board of Educ. of the Westside Community Schools v. Mergens*, 496 U.S. 226 (1990).

As this Court observed in *School Dist. of the City of Grand Rapids v. Ball*, 473 U.S. 373 (1985):

> It follows that an important concern of the effects test is whether the symbolic union of church and state effected by the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices. The inquiry into this

> kind of effect must be conducted with particular care when many of the citizens perceiving the governmental message are children in their formative years. *Cf. Widmar v. Vincent, supra,* at 274, 102 S.Ct., at 276; *Tilton v. Richardson,* 403 U.S. 672, 685-686, 91 S.Ct. 2091, 2099, 29 L.Ed.2d 790 (1971). The symbolism of a union between church and state is most likely to influence children of tender years, whose experience is limited and whose beliefs consequently are the function of environment as much as of free and voluntary choice.

School Dist. of the City of Grand Rapids, 473 U.S. at 390.

Congress has also recognized the vulnerability and impressionability of elementary age children. It specifically excluded elementary age children from coverage under the Equal Access Act because of fear expressed by various members that such children would be unable to distinguish school sponsored prayer and speech from private speech. 20 U.S.C. §§ 4017-4074; *see also* S. Rep. No. 98-357 at 43-49 (1984), *as reported in* 1984 U.S.C.C.A.N. 2348, 2389-94.

Respondent respectfully submits that it acted properly when it rejected the Good News application based upon its policy determination that to allow religious instruction in the schools would be inappropriate and would expand the forum. The impressionability of these students has been recognized by this Court. There was no need for Milford to separately prove the impressionability of elementary age students. Milford was required to take special care to insulate these students from the adult-led proselytizing of the Petitioners. The decision of the court below should be affirmed.

E. The Cases of *Lamb's Chapel*, *Widmar* and *Rosenberg* Do Not Support Petitioners' Arguments.

The Petitioners have written extensively in regard to comparing this case to *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993); *Widmar v. Vincent*, 454

U.S. 263 (1981) and *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819 (1995). We respectfully submit that these cases are inapposite to the present circumstance.

In *Lamb's Chapel v. Center Moriches Union Free School Dist., supra,* the majority of this Court ruled that it was not considering, and did not consider, the issue of religious instruction or Sunday school in a public school in its decision. At footnote 2 of the Majority Opinion, at 389, this Court observed as follows:

> Shortly before the first of these requests, the Church had applied for permission to use school rooms for its Sunday morning services and for Sunday school. The hours specified were 9 a.m. to 1 p.m and the time period one year beginning in the next month. 959 F.2d 381, 383 (CA2 1992). Within a few days, the district wrote petitioner that the application "requesting use of the high school for your Sunday services" was denied, citing both New York Education Law § 414 and the district's Rule 7 barring uses for religious purposes. ***The Church did not challenge this denial in the courts and the validity of this denial is not before us.***

Lamb's Chapel, 508 U.S. at 389 n.2 (Emphasis supplied).

We respectfully submit that the issue in the instant case is the issue identified in Footnote 2 and which this Court did not address in *Lamb's Chapel, supra.* We respectfully submit that the issue before this Court is whether a Sunday school type program, replete with religious instruction and religious indoctrination is permissible in a public school setting. We respectfully submit that under the established facts of this case Good News' activity was impermissible and violated the Establishment Clause.

The facts of this case established that Milford was not dealing with a secular activity presented from a Christian

perspective. *See* Decision of District Court which distinguished *Lamb's Chapel*, Petition for Writ of Certiorari at C29-C30. The District was faced with activity which paralleled a religious worship service and constituted religious instruction. As described by the court below, this activity was "quintessentially religious." *Good News Club v. Milford Cent. School*, 202 F.3d 502, 510 (2000). There was little doubt that the activities engaged in by Rev. Fournier in the meetings of Good News were decidedly religious in nature. Although Good News sought to defend its activities on the ground that it endeavored to teach morality from a Christian perspective, Good News did little more than to change terminology without affecting the content of their message. This definitional coup must fail.

Good News seeks by an alteration of language to change this case into something it is not. Good News seeks by verbal sleight of hand to change religious instruction and religious worship into morality and character education. Although religious instruction may have its moral benefits and may be beneficial to the students' character development, it nonetheless remains purely religious instruction and indoctrination.

The logical extension of Petitioners' argument that its activity is protected speech from a religious viewpoint would be that the Establishment Clause be overruled by the Free Speech Viewpoint Discrimination Doctrine. This would be a result at odds with long standing First Amendment Law. *School Dist. of Abington Township v. Schempp*, 374 U.S. 203 (1963); *Berger v. Rensselaer Cent. School Corp.*, 982 F.2d 1160, 1168 (7th Cir. 1993).

Milford contends that *Lamb's Chapel* is not dispositive of this case. Although *Lamb's Chapel* may provide guidance to schools in viewpoint discrimination cases, this case is purely an Establishment Clause case in which a religious club sought to engage in purely religious worship and instruction under the guise of a free speech argument. By contrast, *Lamb's Chapel*

also involved an evening program for adults concerning a secular subject.

Widmar v. Vincent, 454 U.S. 263 (1981), also is not controlling in this case. In *Widmar*, the University denied permission to a group known as "Cornerstone" which sought to hold its meetings in classrooms or in the student center. The meetings were open to the public and attracted approximately 125 students. The typical Cornerstone meeting included prayer, hymns, bible commentary, and a discussion of religious views and experiences. It is significant that this activity was entirely student led and student driven. Second, it was conducted on a college campus where young adults, rather than children of tender years, were present. In *Widmar*, *supra*, the majority of this Court observed as follows:

> University students are, of course, young adults. They are less impressionable than younger students and should be able to appreciate that the University's policy is one of neutrality toward religion.

Widmar, 454 U.S. at 274 n.14. Thus, the Court's opinion distinguishes *Widmar* from the facts involved in the Good News activity. In Good News, we were dealing with the youngest children registered in a public school. Unlike *Widmar*, we are not dealing with mature young adults expressing themselves in the marketplace of ideas.

Respondent argues that there is simply no comparison between dealing with well-educated adults in a college setting who gather together for purposes of some religious prayer and the gathering of elementary age students for religious indoctrination conducted by a frocked minister of an established church, while the students are still assembled through the means of compulsory attendance laws.

Respondent also notes that in *Widmar, supra,* this Court held that the University had created an open or public forum. This, of course, was unlike the situation at Milford where the school established a limited public forum only. Since the University in *Widmar* could show no compelling reason for closing the

forum to this religious activity, the Court found a constitutional violation in the exclusion of that activity. In this case, Milford had a limited open forum in which no similar activity had ever been demonstrated and where compelling reasons have been shown for closing the forum to the Petitioners' requested use.

In *Widmar v. Vincent, supra*, this Court observed:

> But this Court has explained that a religious organization's enjoyment of merely "incidental" benefits does not violate the prohibition against the "primary advancement" of religion.

Widmar, 454 U.S. at 273.

Unlike *Widmar*, the benefits to the Good News Club from the use of the classroom, immediately after school, were not incidental. Benefits to Good News were significant. Good News had ready access to a group of very young, public school children for purposes of proselytizing. The evidence established that the state's compulsory attendance laws were utilized to support Good News and its religious activities. This conclusion was supported by the fact that Good News' attendance had increased from 8 to 28 by moving from its church to the Milford public school. Milford contends that this was not incidental assistance to Good News and its religious pursuits. Milford urges that this was the very type of unconstitutional assistance which the First Amendment Establishment Clause prohibited.

The Petitioners have also placed heavy reliance upon the case of *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995). *Rosenberger* is likewise inapposite. *Rosenberger* involved a university setting. There were mature young adults in a college setting who were enmeshed in a vibrant marketplace of ideas. Students in *Rosenberger* established a student newspaper called "Wide Awake" which received funding from the University as did numerous other student activities and student run newspapers. The University's objection to this particular newspaper was found in the fact that it was published from a

religious and Christian perspective. The Court found that the refusal to fund "Wide Awake" amounted to unconstitutional viewpoint discrimination.

Rosenberger is markedly different from the present case. First, *Rosenberger* involved a college setting versus Milford's elementary school setting. There is a world of difference between the maturity and intellectual development of college students versus students, ages 5 to 12.

In Milford, there was no similar activity permitted or conducted in the school district which was similar to or which paralleled the religious instruction and religious indoctrination offered by the Petitioners. Milford established that there was no record evidence that substantiated a comparison between the activities described in the record of the Boy Scouts, Cub Scouts, Girl Scouts, 4-H Clubs or Little League which could be said to compare to that of the Petitioners. Further, there was no evidence that the school permitted any other religious, atheistic or similar presentation to occur in Milford. *Rosenberger* dealt with the issue of viewpoint discrimination while the present case deals with an Establishment Clause issue. The two are substantively distinct. *Rosenberger* is, therefore, inapposite.

F. Milford Was Not Hostile to Religion When It Excluded Petitioners' Request for Use of the Building.

When Milford rejected the Petitioners' application for use of its building, it was applying established law. As set forth in detail above, it would be impermissible to allow Good News to conduct its religious instruction, religious indoctrination and religious worship on the premises of Milford. The group of students involved were the youngest and more vulnerable in the school district. To permit this religious group into the school to conduct its religious exercise would be potentially divisive within the small community of Milford, New York. Maintaining government neutrality toward religion is not hostility toward religion. The enmeshing of government with religion harms both government and religion.

The answer to the argument by Petitioners that the Respondent was hostile to religion is found in the following passage from *McCollum, supra,* by Mr. Justice Black:

> To hold that a state cannot consistently with the First and Fourteenth Amendments utilize its public school system to aid any or all religious faiths or sects in the dissemination of their doctrines and ideals does not, as counsel urge, manifest a governmental hostility to religion or religious teachings. A manifestation of such hostility would be at war with our national tradition as embodied in the First Amendment's guaranty of the free exercise of religion. For the First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere. Or, as we said in the *Everson* case, the First Amendment had erected a wall between Church and State which must be kept high and impregnable.

McCollum, 333 U.S. at 211-212.

For the foregoing reasons, Respondent respectfully urges the Court to affirm the Judgment of the court below.

CONCLUSION

In the fall of 1996, Rev. Stephen Fournier and his wife, Darlene, requested the use of the Milford Central School District for meetings of its club known as the "Evangelism Good News Club." The Good News Club intended to meet on Tuesdays, immediately after school. The School Superintendent conducted an appropriate inquiry into what the Good News Club proposed to do inside the school building on Tuesday afternoons. After reviewing the materials submitted by Good News and examining the content of its application for building use, the Superintendent concluded that its services were the equivalent of religious instruction and religious worship. Milford determined that it was obligated, under law, to deny access to Good News for the program of religious instruction and religious worship, it offered.

The Respondent had not engaged in impermissible viewpoint discrimination. Milford has protected its youngest children from adult-led, adult-sponsored, sectarian proselytizing by limiting its forum as it is required by law to do.

The District Court, upon the submission of a complete record, concluded that Good News was engaged in religious worship and religious instruction. The United States Court of Appeals for the Second Circuit affirmed that finding and further concluded that the activities of Good News were "quintessentially religious." In order to preserve the wall of separation between church and state, Respondent urges this Court to affirm the judgment of the court below.

Respectfully submitted,

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